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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-816

NICHOLAS RATTENNI, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, Nicholas Rattenni, respectfully requests that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit, entered in this proceeding on August 11, 1972. Certiorari is also sought as to an order entered on November 28, 1972, by the Second Circuit, denying a motion to remand the case to the District Court for an evidentiary hearing on wiretapped conversations.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit, sub nom. *United States* v. *Cassino, et al.,* dated August 11, 1972, has not yet been reported. It is reprinted in the Appendix hereto, p. 1a, *infra.* The order denying a remand is reprinted at p. 26a, *infra.*

JURISDICTION

Judgments of conviction were entered against the petitioner and various co-defendants on January 27, 1972, in the United States District Court for the Southern District of New York, following an 18-day trial before District Judge Irving Ben Cooper and a jury. The judgments were affirmed on appeal on August 11, 1972, by the Second Circuit, the judgment in question being entered on that date. A timely petition for rehearing was filed by the petitioner Nicholas Rattenni and on October 5, 1972, the Second Circuit entered an order denying that petition. See Appendix hereto, p. 26a, *infra.* On November 28, 1972, the Second Circuit denied a motion to remand; see p. 26a, *infra.*

Upon timely application to Mr. Justice Marshall, an order was entered on October 25, 1972, extending the time for filing this petition for writ of certiorari to and including December 4, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether repeated eavesdropping by state law enforcement officers (who were working in cooperation with federal prosecuting authorities) of telephone conversations between a federal criminal defendant and

his counsel, concerning his federal sentencing and appeal strategies, requires an evidentiary hearing to determine if the recorded conversations were turned over to federal prosecutors and if there was prejudicial impact on the federal sentencing and appeal procedures or was otherwise inherently prejudicial or illegal.

2. Whether the critical element in the application of the federal Travel Act, 18 U.S.C. § 1952, defined as travel in interstate commerce to promote or perform specified unlawful activities, requires direct proof of the particular interstate travel alleged in the indictment, or whether such interstate travel may be inferred from circumstantial factors involving unrelated travels and meetings.

3. Whether it is coercive and hence reversible error to charge a jury in a federal criminal case that any juror who states during deliberations that "This is how I feel and that's it and I don't want to listen to you" is a "Mr. Fool" and "will be dealt with, as he should."

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18, § 1952, known as the Travel Act:

> *§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises*
>
> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

* * * * *

STATEMENT OF THE CASE

The petitioner Nicholas Rattenni and eleven co-defendants were indicted and tried in the Southern District of New York. Count 1 of the indictment charged all defendants with conspiracy to travel in interstate and foreign commerce to promote the unlawful activities of gambling and bribery, in violation of the federal conspiracy statute, 18 U.S.C. § 371. Counts 2 through 14 charged the various co-defendants with specific instances of traveling in interstate and foreign commerce to promote the unlawful activities of gambling and bribery, all such travel being in violation of the federal Travel Act, 18 U.S.C. § 1952. The gambling and bribery activities were alleged to be in violation of the laws of the State of New York.

The case against the petitioner Rattenni was submitted to the jury on Counts 1, 6 and 13. Count 1

charged him with participation in the conspiracy. Counts 6 and 13 together charged that on or about February 4, 1970, Rattenni knowingly traveled in interstate commerce "between the Southern District of New York and New Jersey" with intent to promote and carry on the unlawful activities of bribery (specified in Count 6) and a business enterprise involving a gambling offense (specified in Count 13). The jury returned verdicts of guilty on each of these three counts. The court thereupon imposed on the petitioner a concurrent sentence of three years imprisonment on each count and, in addition, a fine of $10,000 on each count, making a total fine of $30,000. Tr. 3068. This sentence was the stiffest imposed on any of the convicted defendants. On appeal, the Second Circuit affirmed petitioner's conviction and sentence on all three counts.

A. The Government's Conspiracy Case

In a nutshell, as the Second Circuit noted, the indictment charged the various defendants "with engaging in a concerted scheme to bribe New York State policemen in order to protect illegal gambling operations in New York from official interference." The proof of the existence of such a concerted scheme is summarized in the opinion of the Second Circuit (pp. 3a-11a, *infra*) and need not be repeated here, particularly since the sufficiency of such proof is not put in issue by this petition. Suffice it at this juncture to repeat the Government's own synopsis of its case in its brief (p. 3) to the Second Circuit:

> The evidence at trial showed that the defendants conspired to, and did, travel from New York to New Jersey and Puerto Rico for the purpose of promoting unlawful gambling operations and brib-

ery of state policemen who were paid to protect those operations. Defendant Peter Variano, who pled guilty before the trial, was "the No. 1" bookmaker in Westchester and Rockland Counties. In late September of 1969, defendant Michael Roman, Variano's lieutenant, tried to enlist Senior Investigator Joseph Colligan of the New York State Police to protect Variano's gambling operations in return for cash payoffs. After reporting the overture, Colligan began a five-month undercover investigation in which he posed as a willing participant with defendants Cassino, Curico and Malavarco, all New York State Police officers who were bribed to protect the Variano operations. Colligan attended many meetings with Variano and defendant Nicholas Rattenni, whom Variano described to Colligan as a financial backer and who repeatedly advised Variano on the management of his illegal gambling business and on the reliability and uses of the corrupt police officers on his payroll.

Carico and Malavarco, the only defendants who testified, denied any wrongdoing. The other defendants on trial relied principally on attacks on the credibility of the Government's witnesses.*

* Colligan was the Government's chief witness. Much of his testimony was corroborated by ten surveilling agents who also testified at trial.

But even if the Government's version of the case be accepted it is plain that petitioner's role was a most tenuous one at the outermost fringes of the "concerted scheme" concocted by Variano. Colligan, the undercover agent, was the sole Government witness against Rattenni. His testimony depicted Rattenni as largely a social dining and drinking companion of Variano and Colligan, and as a donor to Colligan of a few personal gifts such as sporting event tickets, a sweater

and bottles of perfume—none of which Colligan considered to be a bribe. All of the truly damning statements and actions of the other alleged co-conspirators, such as the passing of $1000 payoffs, took place out of the presence of Rattenni and without his knowledge. While certain arguably incriminating statements were ascribed to Rattenni (see pp. 6a-8a, *infra*), the testimony of Colligan made clear that Rattenni was not involved in any way in the bribery payoffs. And Variano, the kingpin of the scheme, made it plain to Colligan that Rattenni was "clean," that Rattenni was not his partner in the gambling operations, and that Variano did not want Rattenni to know what he was doing in certain of his gambling operations. See Tr. 593-594, 639, 684, 686, 691. Moreover, Lt. Cassino's statement to the FBI, in which he virtually "confessed" everything concerning the conspiracy and offered to turn informer, failed to mention Rattenni even once as being involved in the scheme. Tr. 2022.

In short, the Government's case against Rattenni as a member of the conspiracy was a close and relatively thin one. For two full days the jury deliberated, returning to seek further instructions respecting Rattenni's participation. The jury was obviously greatly concerned about Rattenni's guilt or innocence. The jury could well have found him innocent. But the jury found otherwise and the Second Circuit refused to disturb that conclusion.

B. The Government's Case as to Substantive Offenses

Counts 6 and 13, charging Rattenni with substantive offenses under the Travel Act, both asserted that Rattenni did "travel and cause travel in interstate commerce, between the Southern District of New York

and the State of New Jersey" on February 4, 1970, in order to promote or engage in the bribery and gambling scheme.[1] The travel destination was said at the trial to be the Las Vegas Restaurant in Northvale, New Jersey, which is very close to the New York-New Jersey border.

The trial testimony clearly showed that Variano, Colligan and Rattenni gathered at the Las Vegas Restaurant at about 6 p.m. on February 4. But there was no evidence offered as to any type of interstate travel from New York to New Jersey on that date by Rattenni. As the Government conceded in its brief (p. 24) to the Second Circuit, "there was no direct evidence of interstate travel by Rattenni on February 4, 1970, the date alleged in Counts 6 and 13."[2] The complete absence of such critical evidence is highlighted by the inadequacy of the only testimony submitted by the Government that in any way touched upon the arrival of Rattenni at the restaurant in New Jersey. Investi-

---

[1] The two counts differed only in that Count 6 alleged that the intent of the interstate travel was to promote or carry on the illegal activity of bribery, whereas Count 13 alleged that the intent of the same interstate travel was to promote or carry on the unlawful "business enterprise involving a gambling offense."

Both counts asserted that Rattenni and others "On or about February 4, 1970 . . . did unlawfully, knowingly and willfully travel and cause the travel in interstate commerce between the Southern District of New York and New Jersey," with intent to promote and carry on the specified unlawful activity, and thereafter the said defendants "did perform and attempt to perform acts to promote and carry on and facilitate the promotion and carrying on of the said unlawful activity."

[2] The Government's opening statement to the jury asserted that "The evidence will show that Rattenni physically, personally, traveled to New Jersey." Tr. 206-17. No such evidence was ever introduced.

gator Conklin, who had been assigned to surveillance of Colligan, testified as follows (Tr. 1156-1157):

> Q. Now I go to February 4th of 1970. What occurred on that occasion?
> A. Again myself and Senior Investigator Leibe was assigned to a physical surveillance of Lieutenant Colligan, at which time we followed him to the Las Vegas Club. He went inside. Peter Variano and Nicholas Rattenni arrived and they also went inside.
> Q. They also went inside?
> A. Yes.
> Q. You remained on your surveillance post for the remainder of the evening?
> A. Yes.

And Colligan himself testified merely that "I went to the Las Vegas Restaurant in New Jersey at 6 p.m. Shortly thereafter Mr. Variano and Mr. Rattenni came to the Las Vegas, walked up to the bar." Tr. 488.

Thus the record contains not even a faint suggestion that Rattenni traveled from the Southern District of New York to New Jersey on February 4, 1970, or that he caused any such travel. There is nothing in the record to show where Rattenni was on that day prior to his entrance into the restaurant at 6 p.m. For aught that appears, he may have spent the entire day in New Jersey or in some area other than the Southern District of New York prior to his arrival at the restaurant. There is no indication whether he arrived by automobile, bus, taxi or on foot. And there is an equal absence of proof that either Variano or Colligan traveled on that day from the Southern District of New York to the restaurant in New Jersey, or that Rattenni aided or abetted or accompanied Variano or Colligan in any such travel.

Moreover, the Government's proof made clear that Rattenni was in no way responsible for the scheduling or arranging of the Las Vegas Restaurant meeting on February 4. Colligan, the Government's chief witness, testified (Tr. 487) that the request for this Las Vegas meeting came from Variano while sojourning earlier with Colligan and Cassino in Puerto Rico. Rattenni was not present at that time in Puerto Rico and there was no evidence whatever that Rattenni was advised or otherwise knew in advance of the scheduled meeting between Colligan and Variano at the restaurant on February 4. The record thus leaves the sole impression that Rattenni was a social companion who happened to drop into the Las Vegas Restaurant, from an unknown place of departure and by unknown means, to drink and dine with Colligan and Rattenni. And the $1000 that passed from Variano to Colligan during that restaurant meeting occurred at a point in time when Rattenni was absent making a telephone call and without his knowledge or connivance. Tr. 488-489.

The jury was properly charged that it "must find beyond a reasonable doubt that he [Rattenni] himself travelled or caused travel in interstate commerce between New York State and points outside the State of New York," which was described as one of the "essential elements" of the crime defined by the Travel Act. Tr. 2944. And the jury was further charged that "as a matter of law that travel between New York and New Jersey . . . constitutes interstate travel within the meaning of the statute" and that "[i]t is such travel which gives the Federal Court jurisdiction of the crime charged." Tr. 2944.

Despite this admonition and despite the complete absence of any direct evidence that Rattenni in fact

traveled on February 4 from the Southern District of New York to New Jersey, the jury found him guilty on Counts 6 and 13. This caused and forced the Second Circuit to utilize an afterthought to affirm the conviction under those two counts, an afterthought that had not been argued to or urged upon the jury. Without denying the absence of "direct evidence establishing that on February 4, 1970, he [Rattenni] traveled *from New York* to New Jersey (where the Las Vegas Restaurant is located)," the Second Circuit affirmed the two convictions under the Travel Act upon its own discovery of circumstantial evidence (see Appendix hereto, pp. 14a-15a):

> But the jury could have concluded on the basis of circumstantial evidence that in fact Variano and Rattenni came from New York for the meeting; with the exception of the Las Vegas meetings, every time Colligan saw Rattenni they were in New York; Variano's operations were shown to be in New York and on each of the three occasions when Rattenni joined Colligan and Variano for dinner at the Las Vegas he arrived with Variano; and after the February 11, 1970 meeting all three men drove back to New York.

This ruling of the Second Circuit quite accurately mirrored the argument that had been pressed upon it by the Government in its brief to that court (pp. 23-24):

> These arguments [that there was no evidence of interstate travel by Rattenni or of an agreement to participate in a scheme that contemplated interstate travel] are easily disposed of, since there was ample proof from which the jury could infer that Rattenni had travelled from New York to make the New Jersey meetings which provided the basis for the interstate charges.

Variano's operations were clearly shown to have been based in New York State and on each of the three occasions when Rattenni joined Colligan and Variano for dinner at the Las Vegas he arrived together with Variano (Tr. 349, 488, 494). In addition, after the February 11, 1970, meeting, all three men drove back to New York State (Tr. 499). The conclusion that Rattenni must have travelled to New Jersey from New York for the meeting in question is buttressed by the fact that, with the exception of the meetings at the Las Vegas, every time Colligan saw Rattenni they were in New York State.

In short, although there was no direct evidence of interstate travel by Rattenni on February 4, 1970, the date alleged in Counts 6 and 13, there was ample circumstantial evidence of this element of the crimes charged.

C. The Charge to the Jury

In the course of his charge to the jury, prior to the jury's initial deliberation, the District Judge made the following remarks (Tr. 2964-2965):

> The verdict, whether for acquitted [sic] or for conviction, must be unanimous. Each juror is entitled to his own opinion. You should, however, exchange views with your fellow jurors. That is the very purpose of jury deliberation, 12 jurors, not one.
>
> I heard not long ago that a juror in a case in this building went into the jury room and with arms akimbo said, "This is how I feel and that's it and I don't want to listen to you." And the the jury worked on that person for hours.
>
> That wasn't Mr. Justice, that was Mr. Fool. That was the most irresponsible, degrading piece of conduct. That person will be dealt with, as he should.

> You have a right to your opinion but you must discuss with one another, you must give each the benefit of your views.
>
> And so the law says that you must listen to the arguments of your fellow jurors, you must consult with one another, you must reach an agreement based solely and wholly on the evidence, if you can do so without violence to your own individual judgment, and to employ that high degree of genuine courage you justifiably expect especially in these perilous times from your public officials.
>
> You should not hesitate to change an opinion which upon a consideration of all the evidence and the arguments of your fellow jurors appears erroneous. However, if after carefully considering all the evidence and the arguments of your fellow jurors you entertain a conscientious view that differs from others, you are not to yield your convictions simply because you are outnumbered or outweighed.

And at a later point, during the midst of the jury's deliberations, the District Judge further remarked to the jury to "take your time when you go back to the jury room . . . Certainly the case has to be resolved, certainly we have to figure a way whereby you can resolve it calmly, dispassionately, fairly, remembering what is involved here to both sides, and with that in mind we will cooperate to the fullest extent." Tr. 3041.

The petitioner Rattenni and all the co-defendants objected most vigorously to the District Judge's use of the "Mr. Fool" illustration in the charge and to the obvious threat that any juror expressing an adamant position "will be dealt with, as he should." Tr. 3033. The Second Circuit, while conceding that hypothetical illustrations "should be avoided because of the likeli-

hood that they may divert the jury" and that this particular "Mr. Fool" illustration "well could have been avoided," held that these remarks by the District Judge were "not coercive." See Appendix hereto, pp. 17a-18a, *infra*. The court stated that the "Mr. Fool" remarks were "followed immediately by a correct exposition of the law applicable to each juror in his discussions and in the weighing of the evidence in the jury room. . . . The jury was 'properly instructed that each juror's vote must reflect his considered judgment as to how the case is to be decided'; no more is required."

D. The Wiretapping of Attorney-Client Conversations

On October 5, 1972, the date of the entry of the Second Circuit's order denying rehearing of petitioner's appeal, petitioner's trial counsel for the first time learned that there had been extensive wiretappings of privileged communications between petitioner and his counsel during the periods preceding and subsequent to the sentencing of the petitioner by the District Court on January 27, 1972. Pursuant to an order of District Judge Milton Pollack of the Southern District in an unrelated criminal proceeding, there were delivered to petitioner's counsel on October 5, 1972, part of the logs made of wiretappings of the telephones of petitioner Rattenni and of his daughter, revealing that eight or more recordings had been made of privileged communications between the petitioner and his counsel. These tapped conversations concerned the judgment of conviction and sentence and the grounds for pursuing an appeal to the Second Circuit. The actual recordings of these taps have been requested but not yet received. Following the receipt of this information by petitioner's counsel, the following sequence of events took place:

(1) On October 9, 1972, petitioner's counsel addressed a letter to each of the judges of the Second Circuit, advising them of the newly-revealed wiretaps and requesting permission to file a supplemental memorandum and affidavit furnishing the details of these wiretaps. Included in that letter was "a request for relief in the form of a remand for the purposes of holding a hearing on this issue which was disclosed to us by the prosecution only last week, and such further subsequent action as this Court might deem appropriate under the circumstances." This request was incorporated in and made a part of the subsequent formal motion in the Second Circuit to remand the cause to the District Court for an evidentiary hearing on the wiretapping matters, filed on October 20, 1972. Copies of the logs furnished by the Government and opposing affidavits by counsel for petitioner and the Government were filed with the Second Circuit.

(2) The affidavit filed below by Patrick T. Burke, Special Attorney, Department of Justice, assigned to the Department's Organized Crime Strike Force for the Southern District of New York, conceded the following basic facts:

> On January 17, 1972, pursuant to a New York State Court Eavesdropping Warrant, the New York State Police began to intercept and record telephone conversations over telephones located in the appellant RATTENNI'S home. These interceptions ceased on February 18, 1972.

(3) The affidavit filed below by petitioner's counsel, Roy M. Cohn, asserted that from the documentation made available by Judge Pollack's order it was apparent that: (a) the application for the eavesdropping warrant misrepresented that no privileged communica-

tions were involved; (b) the law enforcement authorities persisted in tapping and recording these attorney-client conversations after they had started and the likelihood of their recurrence and the nature of same had become evident to the law enforcement authorities; (c) the law enforcement authorities had persisted in tapping and recording these conversations after it became evident to them that not one intercepted conversation dealt with gambling or gambling records, which were the asserted reason for the eavesdropping application to the state court; and (d) the Government never disclosed to petitioner the existence or nature of such intercepted conversations until a month after Judge Pollack's order, and then only in response to that order.

(4) The opposing affidavit filed below by Mr. Burke of the Department of Justice asserted that:

> The fact that such telephone conversations had been intercepted was unknown to any member of the Strike Force office until March of 1972, and even at that time, we had no knowledge of the contents of the intercepted communications. At no time were the contents of the intercepted communications divulged to any member of the Strike Force.
>
> Your deponent has been informed that neither of the Assistant United States Attorneys who prepared the brief for the Government on appeal in this case was aware of the existence of the Eavesdropping Warrant or the content of any conversation intercepted over the RATTENNI telephones at any time prior to the affirmance of RATTENNI'S conviction by this Court.

It should be noted here that in 1970 the petitioner Rattenni suddenly became a widely publicized target

of the Organized Crime Strike Force, and his activities and conversations have apparently been kept under close scrutiny since that time. And the state police were at all times working in close cooperation with the federal Strike Force.

(5) On November 3, 1972, petitioner's counsel, Roy M. Cohn, filed a reply affidavit in the court below, stating that the Burke affidavit "raises sharp factual questions concerning the wire-tapped attorney-client conversations, which can only be resolved at an evidentiary hearing." And after noting that the intercepted conversations "concerned events in the trial court, and the very appeal to this Court," Mr. Cohn's affidavit continued:

> Mr. Burke's statement that he did not believe the Strike Force had knowledge of these intercepted conversations is without value. Testimony at a hearing before Hon. Milton Pollack, U.S.D.J., on another matter on October 17, 1972, produced the concession by Assistant District Attorney Louis Cherico, of Westchester County, that writings and conversations about wire-tapped communications involving appellant [Rattenni] were communicated to the Federal authorities commencing mid-February, 1972—long before the appeal in this cause. Without conceding that knowledge on the part of all the public officials involved in the proceedings is necessary, as apparently suggested by Mr. Burke, it is quite clear that the facts as to by whom the wire-tapped attorney-client conversations were heard and with whom they were discussed, as well as their detailed nature, cannot be determined by two conflicting affidavits, but can readily be determined at an evidentiary hearing below, which can result in an accurate record being returned to this Court, which will then be in a position to act as it may deem appropriate.

WHEREFORE, it is respectfully submitted that our motion for remand should be granted.

(6) On November 28, 1972, without comment, the Second Circuit denied petitioner's request for a remand for an evidentiary hearing concerning the intercepted conversations and their possible prejudicial impact on the proceedings in the District Court and the Second Circuit. See p. 26a, *infra*.

REASONS FOR GRANTING THE WRIT

1. The undenied eavesdropping of attorney-client telephone conversations justifies the grant of certiorari in order to remand the matter for an evidentiary hearing as to the extent and impact of the eavesdropping.

Whether and to what extent the intercepted telephone conversations affected the proceedings in the District Court or in the Second Circuit cannot be determined without a full evidentiary hearing. See *Alderman* v. *United States,* 394 U.S. 165, 180-185 (1969). The matter cannot be resolved by conflicting affidavits filed in an appellate court. And since the Second Circuit has denied petitioner's extraordinary request for a reopening of the appeal so that the matter might be remanded to the District Court for such an evidentiary hearing, the petitioner must now seek certiorari from the denial of that motion to the end that the judgment below be vacated and the cause remanded to the District Court for an evidentiary hearing. At the same time, of course, petitioner seeks certiorari with respect to the other questions arising from the affirmance of his conviction.

In addition, should this Court grant certiorari, vacate the judgment below and remand the matter to the

District Court for an evidentiary hearing on the wiretaps, an appropriate order should be entered by this Court preserving the right of petitioner to renew and preserve on any subsequent appeal to the Second Circuit and ultimately on certiorari to this Court the other questions specified in this petition for writ of certiorari. See Questions Presented, Nos. 2 and 3, p. 3, *supra.*

The substantiality and importance of the problem created by the wiretaps of the attorney-client conversations, even though done pursuant to state court authorization, are made evident by this Court's opinion in *Hoffa* v. *United States,* 385 U.S. 293, 306-307 (1966). The Court there assumed the correctness of two decisions of the District of Columbia Circuit holding that "a surreptitious invasion by a government agent into the legal camp of the defense may violate the protection of the Sixth Amendment." See *Caldwell* v. *United States,* 205 F.2d 879 (D.C. Cir. 1953), and *Coplon* v. *United States,* 191 F.2d 749 (D.C. Cir. 1951). As stated in the *Coplon* decision, 191 F.2d at 759, "The prosecution is not entitled to have a representative present to hear the conversations of accused and counsel. We consider it equally true that a defendant and his lawyer have a right to talk together by telephone without their conversations being monitored by the prosecution. . . ." And it may well be that the overhearing of such conversations is so shocking as to warrant reversal of a conviction without any showing of actual prejudice.

True, the instant case does not involve wiretapping of attorney-client conversations prior to or during the trial. Here the wiretaps were authorized by state court order, though by an order possibly secured by mis-

representation. And the extent to which the state authorities, who were working in close conjunction with the federal authorities, turned over to the federal prosecutors the fruits of their wiretaps remains a matter of doubt and dispute.

But these distinctions from prior wiretap situations only add to the substantiality of the problem and the need for a full development of the facts. If it be determined that the federal authorities were promptly supplied with recordings of the attorney-client conversations, then it would become important to decide if the *Caldwell-Coplon* doctrine, as explained in the *Hoffa* opinion of this Court, should be extended to the period of sentence imposition and to the period of preparing an appeal. Certainly nothing is more destructive of a fair adversary appellate process than the surreptitious invasion by law enforcement officers of the attorney-client preparations for an appeal. As Mr. Justice Douglas said recently with respect to the pre-trial period, "It is time, I think, that we hold that the confidences of the lawyer-client relationship remain inviolate." *Russo* v. *Byrne,* No. 72-307, Nov. 13, 1972 (dissent). Those confidences would seem no less inviolate at the sentencing and appeal stages.

2. The decision below raises an important problem as to the nature of the proof of the interstate travel that alone justifies the criminal sanctions of the Travel Act.

The federal Travel Act, 18 U.S.C. § 1952, as this Court noted in *United States* v. *Nardello,* 393 U.S. 286, 292-293 (1969), is "primarily designed . . . to be of 'material assistance to the States in combatting pernicious undertakings which cross State lines'" and accordingly "imposes penalties upon any individual crossing State lines or using interstate facilities for any of the statutorily enumerated offenses." The

principal question raised by the decision below of the Second Circuit relates to the nature or degree of proof required as to this critical statutory element, this crossing of state lines.

At first blush, the Second Circuit's reliance upon circumstantial evidence to justify the jury's conclusion that the petitioner did travel interstate on February 4, 1970, would appear to be a routine exercise in appellate review of a jury verdict. The use of circumstantial evidence to prove guilt in federal courts has long been tolerated. See, e.g., *Tot* v. *United States*, 319 U.S. 463 (1943). But what is novel and therefore important about the Second Circuit's use of circumstantial evidence in this case is that: (1) circumstantial rather than direct evidence is permitted to satisfy the sole factor that justifies the application of this federal statute; and (2) the circumstantial evidence that was utilized by the Second Circuit to justify the conclusion that the petitioner did travel interstate on February 4, 1970, had no rational basis to support such an inference or conclusion.

Restated, the first problem arising from the Second Circuit's use of circumstantial evidence is whether the slender thread of federal authority (interstate travel) in what is otherwise an exclusively state area of unlawful activities should be permitted to be spun by other than direct and clear evidence. So critical is this federal element of interstate travel that courts have consistently treated it as "a necessary jurisdictional element of an offense under Title 18 U.S.C. § 1952." See *United States* v. *Miller*, 379 F.2d 483, 486 (7th Cir. 1967).[3] Should circumstantial evidence be permitted

[3] In his charge to the jury in the instant case, the District Judge stated that it is interstate travel "which gives the Federal Court jurisdiction of the crime charged." Tr. 2344.

to establish that "jurisdictional element"? And should the guesswork involved in circumstantial evidence be allowed to do service as the gravamen of the federal offense that alone justifies federal assistance to local law enforcement? See *United States* v. *Altobella*, 442 F.2d 310, 314-315 (7th Cir. 1971).[4] This Court should provide the answers to those questions in an era of assaults on organized crime, creating a proliferation of prosecutions under the Travel Act.

The other important element of the decision below concerns the abuse of the circumstantial evidence concept. Such evidence may properly be used to infer guilt only "if reason and experience support the inference." *Tot* v. *United States*, 319 U.S. 463, 467 (1943).[5] But the Second Circuit has permitted guilt to rest upon circumstantial factors that lack rational relationship with the particular interstate travel in question. Thus to justify the conclusion that Rattenni did in fact travel from the Southern District of New York to New Jersey on February 4, 1970, the Second Circuit pointed to several unrelated circumstantial factors: (1) Colligan and Rattenni always had met in

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[4] The Senate Report on S. 1653, which became § 1952, stated that "the gravamen of the offense will be travel and a further overt act to aid the enterprise." S. Rep. No. 644, 87th Cong., 1st Sess. 1961, p. 2.

[5] The *Tot* case outlawed as unreasonable a statutory presumption that allowed the interstate procurement of firearms to be inferred from the possession of such firearms by one convicted of a crime of violence or a fugitive from justice. Here, it would seem equally unreasonable to infer interstate travel from New York to New Jersey on February 4, 1970, from previous meetings of Colligan and Rattenni in New York or from a return trip to New York on another occasion—February 11, 1970.

New York, save for the Las Vegas meetings; (2) Variano's operations were in New York; (3) at each of the three dinner meetings at the Las Vegas Restaurant, Rattenni arrived with Variano; and (4) after a later meeting on February 11, 1970, at the Las Vegas all three men drove back to New York.

But "reason and experience" would appear to tell us that none of these factors is a necessary or even likely indication that Rattenni traveled from the Southern District of New York to New Jersey on February 4, 1970. Not one of those four factors forms any rational part of that particular alleged travel on that particular day.

And in its reliance on factors lacking such rational connection in the context of a Travel Act indictment, the Second Circuit's determination is in direct conflict with the Seventh Circuit's decision in *United States* v. *Izzi*, 385 F.2d 412, 413 (7th Cir. 1967). In *Izzi* the Seventh Circuit affirmed a jury's determination that the defendant traveled between Illinois and Indiana on four specific dates by reliance on such directly relevant but circumstantial factors as (1) the observance of the defendant at his home in Illinois and later at the gambling establishment in Indiana on the particular day in question, and (2) the observance of the defendant's car at his home and later near the gambling establishment on another particular day in question. The Second Circuit's reliance on evidence as to other meetings, other dates and other travels cannot be squared with the Seventh Circuit's use of circumstances directly concerned with the particular travel in question.

The end result of so loose and far-ranging use of circumstantial factors is to create an expansive appli-

cation of the Travel Act, against which this Court warned in *Rewis* v. *United States,* 401 U.S. 808, 812 (1971).[6] Criminal statutes in any event should be interpreted and applied through use of circumstantial considerations with far more lenity than the Second Circuit has here demonstrated. See *Bell* v. *United States,* 349 U.S. 81, 83 (1955). But by use of irrational circumstantial factors, the Second Circuit has in effect transformed the Travel Act from a narrow interdiction of particularized interstate travel into a broad outlawry of generalized associations, meetings and travels possessing some interstate flavor.

Finally, by lifting any requirement that a particular interstate travel be shown by direct or at least rational circumstantial evidence, the Second Circuit has rendered impotent the very necessary requirement that the particular travel outlawed by the Travel Act be accompanied by an intent to commit or participate in an unlawful activity. See *Hansen* v. *Haff,* 291 U.S. 559 (1934); *Mortensen* v. *United States,* 322 U.S. 369 (1944). Without some meaningful proof that a particular interstate journey actually occurred, a jury cannot properly assess the intent with which that supposed journey was made.

These important problems as to the type of evidence necessary to justify a conviction under the Travel Act deserve full consideration and resolution by this Court.

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[6] In *Rewis,* this Court stated that an expansive interpretation of the Travel Act would "alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origins of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies." 401 U.S. at 812.

3. The "Mr. Fool" illustration in the instructions to the jury raises an important problem as to the coercion of federal juries.

While acknowledging that the "Mr. Fool" illustration included in the jury instructions could well have been avoided, the Second Circuit concluded that the judge's remarks were not coercive when viewed in the overall context. At the same time, the Second Circuit conceded that hypothetical illustrations, such as the "Mr. Fool" illustration, "should be avoided because of the likelihood that they may divert the jury."

But whatever the propriety of the subsequent remarks by the District Judge concerning the deliberative duties of the jurors, the question remains whether the "Mr. Fool" illustration was so inherently coercive and so likely to "divert the jury" that no amount of ameliorating comments could eliminate the coercive impact. This illustration was used, quite obviously, to threaten any juror who took an adamant or "irresponsible, degrading" position that he might later "be dealt with, as he should," presumably by the court after the verdict was rendered. Such a threat might well have coerced one or more jurors, who were prepared to take an adamant position as to petitioner's innocence, to retreat from their position out of fear of reprisal. And it is certainly the prerogative and indeed the duty of any juror to take whatever position and to render any verdict he deems appropriate unobstructed by threats or coercive illustrations from the trial judge.

It has long been established, even in civil cases, that an erroneous charge upon a hypothetical question not presented by the facts of the case is cause for reversal of the jury's verdict. See *Merchants' Mutual*

Ins. Co. v. *Baring*, 20 Wall. 159 (1874); *Beaver* v. *Taylor*, 1 Wall. 637 (1864); *Keyser* v. *Hitz*, 133 U.S. 138 (1890). The same result would seem to follow when a coercive and hypothetical illustration is given in a criminal case, especially before any juror has so acted as to justify any conceivable comment about the taking of adamant positions.

The illustration here used is far more prejudicial than the following, recently condemned by the District of Columbia Circuit in *United States* v. *Kyle*, No. 71-1091, decided June 15, 1972. There the trial judge had said, following a verdict or not guilty:

> Of course the jury has decided the question of guilt or innocence of this defendant. I don't think I deviated from this policy in the almost 13½ years I have been on the court. I have seen some surprising verdicts, frankly, but this beats anything I ever heard. And you members of the community who are always concerned about the crime situation, to return a verdict like this in this case, I must say, and the Assistant U.S. Attorney almost keeled over, I noticed, when the jury announced the verdict, I would be ashamed of this verdict.

All three judges held this highly improper, dividing as to whether it was prejudicial in a subsequent case where conviction was had by a jury, three of whose members had heard the foregoing "philippic." Cf. ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury § 5.6 (Approved Draft, 1968).

Consequently it seems plain that, given the thinness of the overall proof against him (see pp. 5-7, *supra*), petitioner was irreparably damaged by the "Mr. Fool"

comment, beyond possibility of cure by the usual homilies or by the "charge-as-a-whole" panacea for error in cases where proof is overwhelming.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted. Unless the Court wishes to consider all the questions presented at this time, the decision below should be vacated and the cause remanded to the District Court with instructions to conduct an evidentiary hearing on the prejudicial impact of the overheard attorney-client phone conversations. In that event, petitioner requests that his right to renew and preserve the other issues herein presented be recognized by an appropriate order.

Respectfully submitted,

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December 4, 1972

APPENDIX

APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 910, 911, 912, 913, 914—September Term, 1971.

(Argued June 27, 1972 Decided August 11, 1972.)

Docket Nos. 72-1160, 72-1192, 72-1235, 72-1236, 72-1244

UNITED STATES OF AMERICA,

Appellee,

v.

CHARLES CASSINO, NICHOLAS RATTENNI, EUGENE CURICO, VINCENT MALAVARCO, and MICHAEL ROMAN,

Defendants-Appellants.

Before:

MOORE, SMITH, AND TIMBERS,

Circuit Judges.

Appeals from judgments of conviction entered by the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge,* after trial by jury for conspiracy to violate, and for substantive violations of the Travel Act, 18 U.S.C. § 1952 (1970).

Affirmed.

IRVING ANOLIK, New York, New York, *for Defendants-Appellants Charles Cassino and Michael Roman.*

ROY M. COHN, New York, New York (Saxe, Bacon & Bolan, New York, New York, Thomas A. Bolan and Michael Rosen, of counsel), *for Defendant-Appellant Nicholas Rattenni.*

WILLIAM SONENSHINE, Brooklyn, New York (Evseroff, Newman & Sonenshine, Brooklyn, New York), *for Defendant-Appellant Eugene Curico.*

MORTON N. WEKSTEIN, Yonkers, New York, *for Defendant-Appellant Vincent Malavarco.*

PETER F. RIENT, Assistant United States Attorney, New York, New York (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Edward M. Shaw, Assistant United States Attorney, of counsel), *for Appellee.*

MOORE, *Circuit Judge:*

Charles Vassino, Nicholas Rattenni, Eugene Curico, Vincent Malavarco, and Michael Roman appeal from judgments of conviction entered in the United States District Court for the Southern District of New York after trial by jury before Judge Cooper. The five appellants, with seven others, were indicted on April 14, 1971, for conspiracy to violate, and substantive violations of the Travel Act.[1] Stated simply, the indictment charged the defen-

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[1] *See* 18 U.S.C. §§ 371 (conspiracy), 1952 (interstate travel in aid of racketeering), and 2(a) (aiding and abetting) (1970). Section 1952 prohibits interstate travel with the intent to, *inter alia,* violate state gambling and bribery laws. The state gambling and bribery laws allegedly violated or intended to be violated are N.Y. Penal Law §§ 225.05 (promoting gambling), 225.10 (promoting gambling), 225.20 (possession of gambling records), 200.00 (bribery), 200.10 (bribe receiving), 200.20 (rewarding official misconduct), 200.25 (receiving award for official misconduct), 200.30 (giving unlawful gratuities), 200.35 (receiving unlawful gratuities) (McKinney 1967).

The indictment was brought in fourteen counts against the appellants and Peter Variano, Ernest Lattanzio, Louis John Boggia, Louis Nicholas Sabbatini, Mannie Cohen, William Alter, and Albert Parietti. Count one charged the 12 defendants with con-

dants with engaging in a concerted scheme to bribe New York State policemen in order to protect illegal gambling operations in New York from official interference. We affirm the appellant's convictions.

I.

The government's case rested upon the testimony of a senior investigator for the New York State Police, Joseph Colligan, and the agents who conducted surveillance of him and of the defendants. This testimony established the following case for the government.

A. *Roman Contacts Colligan*

During the afternoon of September 29, 1969, Colligan, who was assigned to the Stony Point State Police Station in Rockland County, New York, received a telephone call from Albert Parietti. Parietti asked Colligan to meet with him later in the afternoon. Colligan agreed and the two

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spiracy to commit offenses against the United States. Counts 2-14 charged the defendants with substantive violations of 18 U.S.C. §§ 2, 1952 (1970).

Variano entered a plea of guilty prior to trial to count one; he was sentenced to three years in prison. The prosecution of Sabbatini was severed prior to trial and subsequently dismissed. The charges against Lattanzio, Boggia, Cohen, and Parietti were dismissed during the trial. On November 24, 1971, the jury found Cassino and Curico guilty on counts 1 and 8 (18 U.S.C. §§ 1952, 2 N.Y. Penal Law § 225.05), Rattenni guilty on counts 1, 6 (18 U.S.C. §§ 1952, 2, N.Y. Penal Law §§ 200.00, 200.10, 100.20, 200.25, 200.35, 200.35), and 13 (18 U.S.C. §§ 1952, 2, N.Y. Penal Law § 225.05), Roman guilty on counts 1, 2 (18 U.S.C. §§ 1952, 2 N.Y. Penal Law §§ 200.00, 200.10, 200.20, 200.25, 200.30, 200.35), and 9 (18 U.S.C. §§ 1952, 2, N.Y. Penal Law § 225.05), Malavarco guilty on count 1 and not guilty on count 8, and Alter not guilty on count one.

Rattenni was sentenced to three years in prison and fined $30,000, Roman to two years in prison, Cassino and Curico to 18 months, and Malavarco to one year.

met later in the day. Parietti asked Colligan if he would meet with Michael Roman to discuss gambling operations in Rockland County. Colligan replied that he would have to consider the matter. The next day Colligan informed his superior of the conversation with Parietti.

Colligan met with Roman on October 1, 1969. This meeting was under surveillance. During the meeting Roman told Colligan that he was "authorized" to pay Colligan $500 just for sitting down and talking. "He then went on," testified Colligan, "to say that his organization had authorized him to come to see me, to make a proposition to offer me $500 per month to protect his organization's gambling places in Rockland County."[2]

The offer was not attractive to Colligan; he asked Roman to arrange a meeting with "his people" to discuss more lucrative offers. Roman agreed and promised Colligan that if he sat down with Roman and the "Number 1" man, he would be made an offer he could not resist.

Apprehensive about Colligan's loyalties, Roman asked him whether he was "wired" (wearing a recording device). Colligan replied no; Roman responded by stating ". . . well, what could I get out of it, six months, and then only if you could prove it."[3] Roman also was nervous about a gentleman sitting close by whom he believed to be one of Colligan's "people." Displaying considerable presence of mind, Colligan not only admitted this but also introduced the agent to Roman, telling the agent "Mike" was a friend of his. They then had a few drinks together.

B. *Colligan Meets Number 1*

On October 8, 1969, Colligan met with Roman and Number 1 in the parking lot of Christy's New Town House in

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[2] Transcript of Trial (Transcript) at 231.
[3] *Id.* at 232.

Nyack, New York. Number 1 turned out to be Peter Variano, who was indicted with appellants but entered a plea of guilty prior to trial. Colligan got into Roman's car and the three drove for "a meal and some drinks" to the Las Vegas restaurant in Northvale, New Jersey. After telling Colligan that "[t]his meeting has been a long time in coming,"[4] Variano said that he had a "marriage" with several New York State policemen, naming appellants Cassino, Curico, and Malavarco. Cassino was a New York State police lieutenant and member of the New York State Joint Strike Force On Organized Crime, while Curico and Malavarco were senior investigators.

At the Las Vegas, Variano proposed to Colligan that for protection of his gambling operations in Rockland County Variano would pay $1000 per month plus fringe benefits—clothing, free trips to Las Vegas and Puerto Rico, a car, and free tickets to sports events. Colligan accepted the offer, and immediately thereafter Variano asked whether he could bring another bookmaking operation into Rockland County. Colligan responded favorably, at which point Variano told Roman to make a telephone call. While Roman was on the phone, Variano gave Colligan $1000 in hundred dollar bills. The new bookmaking operation was set up via the telephone call; Variano told Colligan that the two of them would split the proceeds from the operation and that they would probably each make $300 a week from it.

C. *The Wednesday Meetings At the Las Vegas*

From October 8, 1969 until the end of February, 1970, Variano and Colligan met virtually every week, usually on Wednesday evenings and usually at the Las Vegas. These meetings, occasionally attended by appellant Rattenni, generally included discussions of different aspects of Variano's gambling operations and the roles played by the

[4] *Id.* at 238.

various members of the state police who were being paid to protect those operations. Variano invariably paid for the food and drinks consumed and periodically gave cash payments of $1000 to Colligan, as well as assorted gifts (e.g., tickets to sporting events, clothes, a vacation to Puerto Rico).

1. *The evidence of Rattenni's involvement.*

At the weekly meeting of October 22, 1969, Variano told Colligan something of his relationship with Rattenni.

> He [Variano] then went on, he said to me [Colligan], "People are always trying to—people are always trying to relate me as a partner of Nicholas Rattenni's . . .
>
> . . . .
>
> He stated that this wasn't so, that Nick Rattenni was in the refuse business, and at times he fronted money for him, if he was hit hard on a gambling hit, that he would—if he needed $20,000, $25,000 on a Monday morning or any day where he is hit hard on his books, that the man would give him the money.[6]

At the meeting of November 19, 1969, Variano and Colligan were joined by Rattenni. During the evening Variano spoke of bringing a crap game into the county. Rattenni offered the following advice.

> [Colligan]
>
> A. Mr. Rattenni told Mr. Variano that you have to go slow, you can't go too fast in the business, you take it easy and if you ran the crap game right, ran it two nights a week, that would be worth more than his business phones were at the present time. . . .
>
> . . . .
>
> At this time Mr. Rattenni said to Mr. Variano that "You don't expose him, don't let him get the house, you let your bookkeeper get the house for you and this

[6] *Id.* at 301.

way you don't expose him at all," meaning myself. Mr. Variano agreed with Mr. Rattenni that this was—

. . . .

A. Mr. Variano stated to Mr. Rattenni that this was right, that he would have his bookkeeper get the house, and then Mr. Rattenni asked Mr. Variano what my part would be in the operation. Mr. Variano told Mr. Rattenni that I would protect the game for him on the nights it was in operation.

Q. What did Mr. Rattenni say, if anything?
A. Mr. Rattenni said that this was a good thing.[6]

Rattenni at this same meeting also aired his opinion of Cassino, Curico, and Malavarco. While he praised Malavarvo and Curico (" . . . very good boy, did things without making noise. . . . very classy person . . . didn't make any noise when he did anything for you."),[7] he distrusted Cassino, believing him "too loud, ma[kes] too much noise, tr[ies] to be a big shot,"[8] and advised Variano to get rid of him.[9]

In Rattenni's presence, Variano then gave Colligan copies of FBI search warrants in support of a raid in Nyack a month earlier, saying that he had asked Cassino to review them "with a fine tooth comb" with a view to contesting them in court, and asked Colligan to do the same.

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[6] *Id.* at 350.52.

[7] *Id.* at 252-53.

[8] *Id.* at 352.

[9] Rattenni expressed his uneasiness about Cassino to Colligan on several other occasions. While Rattenni attempts to impugn the accuracy of one of these reported conversations, there is no doubt that Rattenni appears through Colligan's testimony to have been seriously concerned about the risk that Cassino would jeopardize Rattenni's freedom.

At the December 1, 1969, meeting with Variano and Colligan, Rattenni mentioned an incident in which the FBI had returned an automobile to a bookmaker they had arrested and asked Colligan whether this was unusual. When Colligan replied that it was not unusual if there was too much money owed on the car, Rattenni said that the bookmaker had given a statement to the FBI, that the FBI was going to give him a new identity and move him to Virginia to work for them there, and that Variano "should get rid of this guy." [10]

On January 9, 1970, Rattenni was present when Colligan informed Variano that one Patsy Borgese was no longer the target of a Strike Force gambling investigation and when Variano told Colligan that he would make airline and hotel reservations for Colligan and his wife to go to Puerto Rico.

On February 4, 1970, Rattenni was present when Variano told Colligan, after paying him $1000 (not in Rattenni's presence): "I pay you, I don't know what you do with the money. I never ask you what you do with your money, I don't know whether you pay off one of your people or not, I never ask anyone what they do with it and I never pay anyone in front of anyone." [11]

2. *Further evidence of Cassino's, Curico's and Malavarco's involvement.*

During the meetings between them, Variano discussed in further detail with Colligan the services provided to his operations by Cassino, Curico, and Malavarco. Variano said that Cassino was responsible for his being the number one bookmaker in the area and recounted the circumstances under which Cassino had helped him set up his bookmaking establishments in Rockland County. Variano

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[10] Transcript at 373.

[11] *Id.* at 491.

also told Colligan that Cassino owned a bookmaking establishment himself, and worked at one of Variano's locations. In addition, Variano said that Cassino provided protection to Variano by warning of impending raids, by identifying and raiding Variano's competitors, by making stand-in arrests [12] for Variano, and by performing such sundry services as paying off other state policemen and scrutinizing FBI search warrants for defects.

As for the services provided by Malavarco and Curico, Variano told Colligan that he had requested Malavarco's permission to use certain phones in Westchester County, that Malavarco had investigated a competitor of Variano's at Variano's request, that he had asked Malavarco to stay in touch with Officer Sabbatini concerning gambling raids while Variano, Colligan, Cassino, and Curico went to Puerto Rico, and that Malavarco paid Sabbatini and Curico out of the money which he was paid by Variano. With respect to Curico, Variano told Colligan only that Curico was paid $100 a week by Malavarco out of the money that Variano paid Malavarco.

During the period that Colligan was meeting with Variano, surveillance was conducted of the appellants. Cassino, Curico, and Malavarco were each seen on several occasions with Variano. For example, Malavarco was seen meeting with Variano in Variano's car near Malavarco's home on three occasions during December, 1969 and February, 1970, and once in December, 1969, in the men's room of a restaurant.

On November 26, 1969, Variano gave Colligan a Westchester County telephone number which he said belonged to Harry Creighton, a policy operator who was competing with him in the Orangeburg area of Rockland County, and asked Colligan to forward the number to Malavarco so that

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[12] Stand-in arrests are arrests of people paid to be arrested to give the illusion that the gambling laws are being enforced.

Malavarco could do something about Creighton. Variano also suggested that Colligan ask Malavarco who Variano was and predicted that Malavarco would demonstrate his loyalty to Variano by saying that he was a small time bookmaker who was no longer in business. Colligan telephoned Malavarco the next day, gave him Creighton's number and asked him to investigate it. Malavarco said he would do so and, in response to Colligan's inquiry as to who Variano was, said "some people say he is a bookmaker, some people say he is a big bookmaker, some people say he is a small bookmaker, some people say he operates strictly in Rockland County, but he [Malavarco] never hears of him in Westchester County,"[13] even though Variano had estimated that 80% of his business was in Westchester County.

D. *The Puerto Rican Trip*

In late January, 1970, Colligan, Cassino, and Curico spent several days in Puerto Rico as Variano's guests. Cassino and Curico stayed at the same hotel where Variano was staying, were taken to dinner and a show by Variano on two occasions, and were frequently seen in his company. During the Puerto Rican trip, Curico told Colligan that he had been accepting "meals, drinks and stuff" from Variano for nine months. In Curico's presence, Cassino told Colligan that he paid Sabbatini $100 a month for "information that [Sabbatini] was giving out on gambling to Vincent Malavarco."[14] Also in Curico's presence, Cassino warned Colligan to be careful of Lieutenant Dirschka, his superior, who had "almost caught me [Cassino] by accident at one time."[15]

On February 25, 1970, about a month after the Puerto Rican trip, Variano told Colligan in Rattenni's presence

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[13] Transcript at 372.

[14] *Id.* at 478.

[15] *Id.* at 480.

that there were rumors circulating to the effect that Colligan, Cassino, and two others had been in Puerto Rico with a bookmaker. Colligan met with Cassino and Curico the same day to tailor their stories, and it was decided that he and Cassino would admit having been in Puerto Rico but that Curico would deny it.

E. *Cassino, Curico, and Malavarco Are Arrested*

Colligan's investigation ended on March 5, 1970, with the arrests of Cassino, Curico, Malavarco and others. After his arrest, Cassino confessed his involvement with Variano's gambling enterprises, admitted having furnished Variano with the name of a Strike Force target and having made stand-in arrests for Variano, and admitted that Variano had paid for his trip to Puerto Rico as well as giving him clothes and tickets to sporting events. Curico, in his post-arrest statement, initially claimed that he had never met Variano but then admitted having met him on numerous occasions over the past five or six years. Curico at first denied having taken a trip to Puerto Rico, but then admitted that he had gone there under an assumed name and had seen Variano and had drinks with him there. Malavarco, when asked about Variano after his arrest, denied having met with Variano on the four occasions when the two men were seen together by surveilling agents, or on any other occasion.

II. Asserted Grounds for Reversal

A. *Sufficiency of the Evidence*

All appellants contend that the evidence was insufficient to submit the charges against them to the jury and/or that the evidence is insufficient to sustain their convictions.

A multi-defendant trial involving a criminal conspiracy count and related substantive counts almost always presents serious legal problems both for the trial judge and counsel. The case, of necessity, must be unfolded through the testimony of one or more witnesses—and in narrative

form. Upon appeal the record must be considered as a whole. More likely than not the facts will be developed chronologically. In admitting testimony, the trial judge is confronted with two seemingly conflicting principles (1) hearsay declarations of co-conspirators are admissible; (2) hearsay declarations are not admissible until a conspiracy has been established. But in real life, conspiracies are not so easily identified. It would be a rare case in which the conspirators assembled together and planned to bribe State officers. The law has taken cognizance that conspiracies are not so born. It permits inferences of their existence to be drawn from the conduct and speech of the actors. Just as a complicated brief cannot be written in one sentence, neither can events covering a substantial period of time be disclosed in a single answer. For this reason the trial judge is forced to anticipate the future and accept testimony "subject to connection." This necessitous practice leads to the question: has it been connected? In a long trial it is frequently impossible to point to any definite nexus. The trial judge has to decide whether a conspiracy has been established and whether hearsay has been properly admitted upon that supposition. The appellate court is able to view the record as a unit and has the advantage of reading the completed testimony—an advantage which the trial judge did not have in ruling upon each question and answer as the case was unrolled.

Under those standards of review we conclude that the evidence is sufficient to support the appellants' convictions.[16] Of this there can be no question as to Cassino, Curico, or Roman. Rattenni contends that the evidence of his "stake"[17] in the conspiracy is insufficient to warrant a

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[16] *See United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).

[17] ". . . he [the alleged conspirator] must in some sense promote their venture himself, make it his own, have a stake in its outcome." *United States* v. *Falcone*, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940) (L. Hand, *J.*).

finding of participation. We disagree. Colligan's testimony as to what Rattenni had told him in their various meetings was sufficient to warrant a reasonable conclusion that there "was a working relationship between the two men," [18] and that Rattenni was associated with the venture to protect Variano's gambling operations from official interference and sought to make it succeed.[19] His thorough knowledge of Variano's operations, his advice as to how to run those operations, and his concern about the loyalties of the officers on Variano's payroll permit the reasonable conclusion that Rattenni was more than a "drinking companion" [20] of Variano. While the evidence independent of the declarations of co-conspirators as to Malavarco's participation in the conspiracy is not overwhelming, it is sufficient. His response to Colligan's telephone inquiry of November 27, 1969, concerning Variano, and particularly his rather unusual meetings with Variano (three times at early morning hours in Variano's car and once in the men's room of a restaurant), unreported and denied upon arrest, permit

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[18] *United States* v. *Peltz*, 433 F.2d 48, 51 (2d Cir. 1970), *cert. denied*, 401 U.S. 955 (1971). See *also id.*: ". . . it is unnecessary to a conspiracy that the relationship contemplated mutual benefit, ..."

[19] *See Pereira* v. *United States*, 347 U.S. 1, 9-11 (1954); *Nye & Nissen* v. *United States*, 336 U.S. 613, 618-20 (1949), *quoting* Learned Hand in *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938): "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.' "

[20] "What the record does show is a clear picture of Rattenni as an outsider, a drinking associate, a gossiper, who was not a participant in, nor one who furthered, the conspiracy." Reply Brief for Appellant Rattenni at 7.

the reasonable conclusion that Malavarco was a member of the conspiracy.[21]

Similarly the jury could have found on all the evidence that the appellants committed the crimes charged beyond a reasonable doubt. Again as to Cassino, Curico, and Roman there can be no doubt. The independent evidence of Rattenni's association with the conspiracy, and Variano's statement of October 22, 1969, that Rattenni would stake him $20,000 to $25,000 whenever he needed it, permit the conclusion that Rattenni was a member of the conspiracy.

Rattenni contends that there is no direct evidence establishing that on February 4, 1970, he travelled *from New York* to New Jersey (where the Las Vegas Restaurant is located), thereby vitiating his conviction on the substantive counts charging violations of the Travel Act. But the jury could have concluded on the basis of circumstantial evidence that in fact Variano and Rattenni came from New York for the meeting: with the exception of the Las Vegas meetings, every time Colligan saw Rattenni they were in New York; Variano's operations were shown to be in New York and on each of the three occasions when Rattenni joined Colligan and Variano for dinner at the Las Vegas

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[21] *See United States* v. *Calabro*, 449 F.2d 885, 890 (2d Cir. 1971), *cert. denied*, 405 U.S. 928 (1972):

> It is true that almost every aspect of Calabro's conduct is susceptible of an inference other than his participation in the conspiracy. However, as Judge Friendly observed in United States v. Geaney, *supra*, 417 F.2d at 1121, "Pieces of evidence must be viewed not in isolation but in conjunction." A seemingly innocent act, when viewed in the context of surrounding circumstances, may justify an inference of complicity.

That the evidence of Malavarco's complicity is circumstantial is not fatal to the establishment of this complicity. *United States* v. *Ragland*, 375 F.2d 471, 477, 478 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968). *See Holland* v. *United States*, 348 U.S. 121, 140 (1954); *United States* v. *Bowles*, 428 F.2d 592, 597 (2d Cir.), *cert. denied*, 400 U.S. 928 (1970).

he arrived with Variano; and after the February 11, 1970 meeting all three men drove back to New York.[22]

Finally, Variano's and Rattenni's declarations as to Malavarco's participation in the conspiracy are clearly sufficient to sustain the jury's conclusion as to his guilt on the conspiracy count.

B. *Judge Cooper's Charge and Conduct of the Trial*

1. *The charge.*

Appellants raise several objections to Judge Cooper's charge and supplemental charge to the jury. Most were not objected to below and are plainly without merit. We consider here only two of the objections: first, that Judge Cooper's explanation of the evidence sufficient to establish the existence of a conspiracy was prejudicial to the defendants; and second, that the charge coerced guilty verdicts from the jury.

The jury after deliberating for some time requested further instructions from Judge Cooper on the elements necessary to prove a conspiracy. In further explaining the nature of the proof minimally necessary to establish an unlawful agreement Judge Cooper said:

> To establish a conspiracy the government is not required to show that two or more persons sat around a table and then entered into a solemn pact orally or in writing stating that they have formed a conspiracy to violate the law and setting forth details of the plan like an architect's blueprint. It would extraordinary if ever such a situation existed.
>
> Your common sense will tell you that when men in fact undertake to enter into a criminal conspiracy, much is left to the unexpressed understanding. You could nod your head, that's the same as saying, "Okay

[22] *See* note 21 *supra.*

> with me," or you could say, "I would very much like to be considered as taking under advisement the possibility that I shall entertain your proposition, and having done so I am ready to participate." That's an elongated form of just the affirmance by a nod of the head.[23]

Considering this language in context,[24] we conclude that it was not prejudicial to the appellants. In explaining the difficult concept of conspiracy to the jury, Judge Cooper discussed at length the proposition that actions often speak louder than words and that a specific, tangible agreement in words is not necessary to establish the existence of a conspiracy. The charge in this respect was fair and properly responsive to the jury's request.[25]

Appellants also object to portions of the charge and supplemental charge they believe were coercive.

In his charge Judge Cooper said:

> The verdict, whether for acquitted [sic] or for conviction, must be unanimous. Each juror is entitled to his own opinion. You should, however, exchange views with your fellow jurors. That is the very purpose of jury deliberation, 12 jurors, not one.
>
> I heard not long ago that a juror in a case in this building went into the jury room and with arms akimbo said, "This is how I feel and that's it and I

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[23] Transcript at 2995.

[24] *See United States* v. *Kahaner,* 317 F.2d 459, 479 (2d Cir.), *cert. denied,* 375 U.S. 836 (1963).

[25] *See United States* v. *Jacobs,* 431 F.2d 754, 760-62 (2d Cir. (1970), *cert. denied,* 402 U.S. 950 (1971), where we approved Judge Cooper's charge and supplemental charge on conspiracy against a similar attack as "in all respects fair and proper." *Id.* at 762. *See* Transcript of Trial at 1129, 1123-33, 1195-96, 1206-07, *id.*

don't want to listen to you." And the jury worked on that person for hours.

That wasn't Mr. Justice, that was Mr. Fool. That was the most irresponsible, degrading piece of conduct. That person will be dealt with, as he should.

You have a right to your opinion but you must discuss with one another, you must give each the benefit of your views.

And so the law says that you must listen to the arguments of your fellow jurors, you must consult with one another, you must reach an agreement based solely and wholly on the evidence, if you can do so without violence to your own individual judgment, and to employ that high degree of genuine courage you justifiably expect especially in these perilous times from your public officials.

You should not hesitate to change an opinion which upon a consideration of all the evidence with your fellow jurors appears erroneous. However, if after carefully considering all the evidence and the arguments of your fellow jurors you entertain a conscientious view that differs from others, you are not to yield your convictions simply because you are outnumbered or outweighed.[26]

The appellants all stress the "Mr. Fool" illustration. Although hypothetical illustrations should be avoided because of the likelihood that they may divert the jury, this particular illustration, which well could have been omitted, was not coercive. It was followed immediately by a correct exposition of the law applicable to each juror in his discussions and in the weighing of the evidence in the jury room. Considered in context this instruction was not prejudicial to the defendants. The jury was "properly in-

[26] Transcript at 2964-65.

structed that each juror's vote must reflect his considered judgment as to how the case is to be decided";[27] no more is required.

During the afternoon of November 24, 1971, the jury became trapped in a stalled elevator for approximately one and one-half hours. In speaking to the jury afterwards, Judge Cooper asked them whether they wished to continue deliberations; the jury members concluded thereafter that they did. During this session Judge Cooper said:

> Won't you, therefore, take your time when you go back to the jury room, let me have a note as to how you feel about going on? Certainly the case has to be resolved, certainly we have to figure a way whereby you can resolve it calmly, dispassionately, fairly, remembering what is involved here to both sides, and with that in mind we will cooperate to the fullest extent.[28]

Counsel later objected to this comment in the robing room. Judge Cooper agreed with the objection, and recharged the jury.[29] Thus whatever coercive effect there was in the first comment was effectively eliminated in the recharge.

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[27] *United States* v. *Bowles*, 428 F.2d 592, 595 (2d Cir.), *cert. denied*, 400 U.S. 928 (1970). *See United States* v. *Martinez*, 446 F.2d 118 (2d Cir.), *cert. denied*, 404 U.S. 944 (1971); *United States* v. *Hynes*, 424 F.2d 754 (2d Cir.), *cert. denied*, 399 U.S. 933 (1970).

[28] Transcript at 3041.

[29] The Court: Members of the jury, it is now about 5:10 and I am most anxious to make it extremely clear to you, as clear as I can possibly make anything clear, that what I said to you about a half hour or so ago in no way, not in any sense whatever, is to run counter to what I pleaded with you, as a judge to a jury, when I concluded yesterday with these words—in other words, what I am about to read to you is what I told you yesterday and it is as true and as vibrant and as full of life and as full of meaning as it was when I uttered it for the first time in this trial: You have a right to your opinion but you must discuss with one another, you must

2. *Judge Cooper's limitation of cross examination.*

Appellant Cassino claims that he was denied due process by Judge Cooper's limitation of his cross examination of the agent who took his post-arrest confession. Agent Sullivan testified on direct examination to Cassino's post-arrest admissions of his knowledge of and participation in Variano's gambling enterprises. Counsel for Cassino then cross examined Sullivan, bringing out the facts that Cassino was surprised to be arrested, that Cassino had refused to sign a waiver of rights form;[20] that Cassino had participated in

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give each the benefit of your views. And so the law says you must listen to the arguments of your fellow jurors, you must consult with one another, you must reach agreement based solely and wholly on the evidence, if you can do so without violence to your own individual judgment and to employ that high degree of genuine courage you justifiably expect, especially in these perilous times, from your public officials, and that includes the judges and the lawyers. You should not hesitate to change an opinion which upon a consideration of all the evidence with your fellow jurors appears erroneous. However, if after carefully considering all the evidence and the arguments of our fellow jurors you entertain a conscientious view that differs from others, you are not to yield your convictions simply because you are outnumbered or outweighed. And of course this instruction applies to each defendant on trial, because you remember I said over and over again that guilt is persoanal [sic] and the guilt or innocence of each defendant must be determined by you as though he were the only one on trial.

Id. at 3061-62.

[20] Before he confessed Cassino was twice advised of his rights, and stated that he understood them. Thus his signature on a waiver form was not necessary to permit the introduction of his confession into evidence. *United States* v. *Speaks*, 453 F.2d 966, 968-69 (1st Cir. 1971), *cert. denied*, —— U.S. —— (1972) (40 U.S.L.W. 3503); *United States* v. *Crisp*, 435 F.2d 354, 358 (7th Cir. 1970), *cert. denied*, 402 U.S. 947 (1971); *United States* v. *McNeil*, 433 F.2d 1109, 1113 (D.C. Cir. 1969); *Klinger* v. *United States*, 409 F.2d 299, 308 (8th Cir.), *cert. denied*, 396 U.S. 859 (1969); *United States* v. *Hayes*, 385 F.2d 375, 377 (4th Cir. 1967), *cert. denied*, 390 U.S. 1006 (1968). *See United States* v. *Welch*, 455 F.2d 211, 213 (2d Cir. 1972) (*per curiam*).

a raid on one of Variano's establishments in October of 1969, and that Sullivan's interview log did not mention Cassino's confession. Cassino's attorney also tried to suggest that Cassino had been joking when he said that he worked for Variano.

After Cassino's attorney completed his cross examination of Sullivan, the question arose of how to deal with the desire of three of the defendants on trial to bring out the fact that Cassino's confession did not name them. The court resolved this difficulty by permitting the three unnamed defendants to elicit the fact of Cassino's silence as to them without revealing the identities of any defendants named by Cassino. Cassino's attorney then stated that he wanted to "bring out the confession word for word" to "rehabilitate" his client, claiming that portions of the confession exculpated Cassino. Pointing out that counsel had already completed his cross examination, during which he had a copy of Cassino's confession, the court rejected his request to cross examine further with respect to the confession, but did give him permission to cross examine further with respect to other areas.

Thus Judge Cooper did not abuse his descretion in limiting Cassino's right to further cross examine Agent Sullivan, particularly in light of Cassino's failure to indicate what further questions he would like to have put to Agent Sullivan.[21] Judge Cooper obviously had to carefully limit the questioning of Agent Sullivan,[22] and under the circumstances he was completely fair to Cassino's counsel.

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[21] *See United States* v. *Campbell*, 426 F.2d 547, 550 (2d Cir. 1970); *United States* v. *Persico*, 425 F.2d 1375, 1383-84 (2d Cir.), *cert. denied*, 400 U.S. 869 (1970); *United States* v. *Gorman*, 355 F.2d 151, 160-61 (2d Cir. 1965), *cert. denied*, 384 U.S. 1024 (1966); *Commercial Banking Corp.* v. *Martel*, 123 F.2d 846, 847 (2d Cir. 1941).

[22] *See Bruton* v. *United States*, 391 U.S. 123 (1968).

C. Alleged Improper Conduct By the Prosecutor

One of the many gifts made to Colligan by Variano was a color television set. Colligan claimed that when given the set by Variano he believed it not to be a gift but a purchase, and fully intended to pay Variano for it. The day after receiving the set Colligan told his superior about the incident. Lieutenant Dirschka instructed Colligan to keep the set in his home in case any of the principals in the investigation visited him there. He did not mention the incident in his reports because he felt at the time that the transaction was a purchase rather than a fringe benefit for protecting Variano's gambling operations.

The prosecutor did not elicit from Colligan the story about the television set, which he discovered just prior to the completion of Colligan's direct examination. He explained his decision as follows:

> I had a discussion with Lieutenant Colligan as to whether or not we had everything he received from Variano set forth before the jury. He said yes, everything he had received in the way of what he considered a bribe or a gift was set forth. However, he then went on to relate to me the story about a television set yesterday, long after I prepared any bill of particulars with regard to this.
>
> I said, "Undoubtedly this will come out on cross examination and as soon as you are asked one question as to whether you got any gifts whatsoever in this regard, you make it known there is a television set involved and you explain the circumstances of what you consider a purchase and what counsel may consider to be otherwise." [33]

The decision not to elicit the story about the television set was, as the government concedes in its brief, unwise,[34]

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[33] Transcript at 732.

[34] *See United States* v. *Freeman*, 302 F.2d 347, 350 (2d Cir. 1962), *cert. denied*, 375 U.S. 958 (1963).

but it was not misconduct prejudicial to the defendants. They fully exploited the incident on cross examination. Thus even assuming the story of the set to be material evidence, and even assuming the government's suppression of the story deliberate (a questionable assumption), the fact that the jury learned the details of the story precludes a successful challenge. As the Supreme Court said in *Giglio*: "A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'"[35] Here clearly the "false testimony" would not in any reasonable likelihood have affected the judgment of the jury.

Rattenni further complains that one of Colligan's reports had to be "smoked out by the defendants." The report was a comprehensive report covering Colligan's entire investigation. This report was in essence a compilation of the individual reports Colligan made after each meeting with the defendants. These individual reports were turned over to the defendants prior to the completion of Colligan's direct testimony. Because the prosecutor was previously unaware of the existence of the compilation, it was not turned over to the defense until a portion of Colligan's cross examination had been completed. Because the report was used by several of defense counsel in cross examination, and because the failure to turn over the report was clearly inadvertent, this alleged suppression likewise does not warrant a new trial.[36]

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[35] *Giglio* v. *United States*, 405 U.S. 150, 154 (1972), *quoting Napue* v. *Illinois*, 360 U.S. 264, 271 (1959); *United States* v. *Mele*, —— F.2d ——, —— (2d Cir. 1972) (September Term, 1971, slip ops. 3527, 3538) ("At least where the suppression is deliberate, the defendants need only show that the evidence is material and could in any reasonable likelihood have led to a different result on retrial."). *See United States* v. *Mayersohn*, 452 F.2d 521, 525-26 (2d Cir. 1971); *United States* v. *Freeman*, 302 F.2d 347, 350 (2d Cir. 1962), *cert. denied*, 375 U.S. 958 (1963).

[36] *See* note 35 *supra*.

Rattenni and Malavarco further complain that the prosecutor knowingly permitted Colligan to testify that he received clothes

D. *Appellants' Motions To Sever*

Appellants Roman, Curico, and Malavarco contend that their trials should have been severed from the trial below. We disagree. Trial judges possess broad discretion in granting motions to sever pursuant to Fed. R. Crim. P. 14;[37] that discretion was not abused here. Each of the appellants was shown to have participated in a common criminal scheme and no prejudice resulted from their joint trial.[38] That they might have had a better chance of acquittal by being separately tried is plainly insufficient to justify severance.[39]

Malavarco contends that severance should have been granted to him after Agent Sullivan testified as to Cas-

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of less value than he allegedly in fact received. Again, even assuming the suppression to be knowing, the fact that the evidence allegedly establishing that Colligan received more in clothing from Variano than he testified to was placed before the jury by defense counsel vitiates whatever force this complaint has.

[37] *Schaffer* v. *United States*, 362 U.S. 511, 513 (1960); *Stilson* v. *United States*, 250 U.S. 583, 585-86 (1919); *United States* v. *Projansky*, —— F.2d ——, —— (2d Cir. 1972) (September Term, 1971, slip ops. 3665, 3694); *United States* v. *Vega*, 458 F.2d 1234, 1236 (2d Cir. 1972); *United States* v. *Borelli*, 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971); *United States* v. *DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971).

[38] "Reasons for severance are founded on the principle that evidence against one person may not be used against a codefendant whose crime is unrelated to the others." *Schaffer* v. *United States*, 362 U.S. 511, 523 (1960) (Douglas, *J.*, dissenting).

[39] *United States* v. *Fantuzzi*, —— F.2d ——, —— (2d Cir. 1972) (September Term, 1971, slip ops. 4023, 4030-31); *United States* v. *Borelli*, 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971); *United States* v. *DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971), *quoting Tillman* v. *United States*, 406 F.2d 930, 935 (5th Cir.), *vacated as to one defendant on other grounds*, 395 U.S. 830 (1969).

sino's confession. Counsel for Roman, Rattenni, and Parietti brought out from Agent Sullivan the fact that Cassino did not mention their clients in his confession, but did mention other defendants. Malavarco contends that the jury must have inferred that he was one of the other defendants mentioned in Cassino's confession. Judge Cooper promptly and carefully instructed the jury not to speculate as to the "other defendants" mentioned by Cassino.

We conclude that the limiting instructions were sufficient under the circumstances to protect Malavarco's *Bruton* rights and that severance was properly denied. In determining whether a co-defendant's *Bruton* rights are violated in situations analogous to the one before us, courts have interpreted *Bruton* to require reversal only if (1) the testimony concerning the complaining co-defendant is clearly inculpatory,[40] and (2) the testimony is vitally important to the government's case.[41]

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[40] *United States* v. *Deutsch*, 451 F.2d 98, 116 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972); *United States* v. *Trudo*, 449 F.2d 649, 651-53 (2d Cir. 1971), *cert. denied*, 405 U.S. 926 (1972); *United States* v. *Cunningham*, 446 F.2d 194, 198-200 (2d Cir.), *cert. denied*, 404 US. 950 (1971); *United States ex rel. Nelson* v. *Follette*, 430 F.2d 1055, 1057 (2d Cir. 1970), *cert. denied*, 401 U.S. 917 (1971); *United States* v. *Cusumano*, 429 F.2d 378, 381 (2d Cir.), *cert. denied*, 400 U.S. 830 (1970); *United States* v. *Persico*, 425 F.2d 1375, 1382-83 (2d Cir.), *cert. denied*, 400 U.S. 869 (1970); *United States* v. *Carella*, 411 F.2d 729, 732 (2d Cir.), *cert. denied*, 396 U.S. 860 (1969). *See Bruton* v. *United States*, 391 U.S. 123, 126, 135-36 (1968).

[41] *Frazier* v. *Cupp*, 394 U.S. 731, 735 (1969); *Bruton* v. *United States*, 391 U.S. 123, 126, 135-36 (1968); *United States ex rel. Duff* v. *Zelker*, 452 F.2d 1009, 1010 (2d Cir. 1971); *United States ex rel. Nelson* v. *Follette*, 430 F.2d 1055, 1058-59 (2d Cir. 1970), *cert. denied*, 401 U.S. 917 (1971); *Wapnick* v. *United States*, 406 F.2d 741, 742-43 (2d Cir. 1969) (*per curiam*).

Malavarco's contention meets neither test: while the jury might have inferred that one of the "other defendants" mentioned by Agent Sullivan was Malavarco, the jury did not necessarily or even probably have to conclude that the reference was inculpatory since both Cassino and Malavarco were state troopers, and Cassino might have mentioned Malavarco's name only in that context; moreover, the inference that Malavarco was one of the "other defendants" and the further inference that the reference was inculpatory were not vital to the government's case against Malavarco, given the evidence of Malavarco's guilt provided by the declarations of Variano and Rattenni and the testimony of the agents who conducted surveillance of Malavarco.

We have considered the other grounds urged for reversal and conclude that they are without merit and do not require discussion. The judgments of conviction are affirmed.

[Caption omitted]

Judgment

Appeals from the United States District Court for the Southern District of New York.

These causes came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgments and orders of said District Court be and they hereby are affirmed in accordance with the opinion of this court.

Filed: August 11, 1972.

[Caption omitted]

Order on Rehearing

A petition for a rehearing having been filed herein by counsel for the appellant, Nicholas Rattenni,

Upon consideration thereof, it is
Ordered that said petition be and it hereby is DENIED.

Entered: October 5, 1972.

[Caption omitted]

Order Denying Remand

It is hereby ordered that the motion made herein by counsel for the appellant Nicholas Rattenni by notice of motion dated October 20, 1972, to remand the action to the United States District Court for the Southern District of New York for the purpose of holding an evidentiary hearing be and it hereby is denied.

Dated: November 28, 1972.